Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

PEGGY A. GALLO-LOEKS,

Petitioner,

v.

U S WEST COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the burden placed upon a victim of reverse discrimination in order to establish a prima facie claim of discrimination?

2. Did Petitioner Peggy Gallo Loeks sufficiently establish that the employer's proffered explanation for it's actions against her are false?

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OPINIONS BELOW

This case was heard by the United States Court of Appeals for the Tenth Circuit, case number 02-1167. The decision is unpublished, and appears in Appendix A, hereto. The decision of the United States District Court for the District of Colorado, case number 00-WM-1863 is also unpublished and appears in Appendix B, hereto.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The district court had supplemental jurisdiction over Petitioner's state law claim pursuant to 28 U.S.C. § 1367. The United States Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The court of appeals entered its order on February 5, 2003. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(b) Employer practices

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner Gallo-Loeks, Caucasian, brought claims for reverse race discrimination in violation of 42 U.S.C. § 2000e, *et seq.*, and Colorado's Anti-Discrimination Act, 24 C.R.S.A. § 24-34-402. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. U.S. West moved for, and was granted, summary judgment, and the United States District Court for the Tenth Circuit affirmed.

Ms. Gallo-Loeks' had been an employee for 22 years when claim arose in or around 1998. She was suspended for allegedly submitting false information to a third-party administrator for tuition reimbursement. Ms. Gallo-Loeks had taken what she believed was an approved class; however, unbeknownst to her, because the approved class was full, she was directed to a class which was not from an approved provider. As a consequence, Gallo-Loeks was suspended for two weeks, ordered to repay $700 within thirty days or be suspended, and placed on warning of dismissal for one year, and the discipline was made a part of her personnel file. At the time, Gallo-Loeks' supervisor was James Tarantino. Mr. Tarantino was supervised by Edna Haliburton, an African-American.

The investigation of Ms. Gallo-Loeks was highly unusual because it bypassed her immediate supervisor. Tarantino should have been informed because he was responsible for conducting a preliminary investigation and presenting data to the investigator. This was the only time, to Mr. Tarantino's knowledge, that he was not involved in such a security investigation. Instead, Haliburton and Pathways originated the investigation. Pathways administered the tuition reimbursement program.

In contrast, Audrey Christian, an African American, was investigated by her immediate supervisor, Tarantino regarding concerns he had about how Christian was using the employer's American Express credit card. Tarantino had been directed by Haliburton to investigate Christian's American Express account which was 120 days delinquent.

In reviewing Christian's receipts, Tarantino found some questionable activities, and requested that Christian turn her American Express card in to him. Instead, Tarantino learned that Haliburton had already authorized payment for Christian. Tarantino expressed to Haliburton his conclusion that Christian had submitted a false document to U.S. West, to hide the fact that she had allowed her husband to use her card, in violation of company policy, and contrary to written and verbal instructions Tarantino had issued to employees. Nonetheless, Haliburton had authorized Christian to receive a new corporate credit card against Tarantino's recommendation and advice. Tarantino then experienced a second incident with Christian in or around June 2000. Christian refused to obey direct instructions from Tarantino and Haliburton ordered Tarantino not to discipline Christian.

Tarantino's testimony included evidence that Christian had also received preferential treatment with respect to

scheduling, overtime, security investigations, shifts and days off. Tarantino testified to his belief that Haliburton chose to treat Christian more favorably.

REASONS FOR GRANTING THE WRIT

The circuits are split with respect to the burden a victim of reverse discrimination has in establishing a prima facie claim of discrimination. For example, some circuits require the Plaintiff to establish, as part of the prima facie case, "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Mills v. Health Care Svs. Corp.*, 171 F.3d 450 (7th Cir. 1999); *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *quoted in Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993); *see also Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985); Tenth Circuit requires a reverse discrimination Plaintiff to establish a prima facie case of discrimination and must demonstrate: (1) "show background circumstances that demonstrate that [the] employer is one of those unusual employer who discriminate against the majority." *Notari v. Denver Water Dep't.*, 971 F.2d 585, 590 (10th Cir. 1992). Alternatively; (2) the Plaintiff "must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.*

Other circuits and district courts place no more onerous burden on a reverse discrimination Plaintiff than on a so-called minority Plaintiff alleging discrimination. *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000); *Bass v. Bd. of County Comm'rs.*, 256 F.3d 1096, 1103 (11th Cir. 2001) (treating Plaintiff's claim of

discrimination "as discrimination claims, not as 'reverse discrimination' claims, and analyzing such claims "exactly as we would any racial discrimination claim."); *Shealy v. City of Albany, Georgia*, 89 F.3d 804, 805 (11th Cir. 1996); *Ticali v. Roman Catholic Diocense of Brooklyn*, 41 F. Supp. 2d 249, 261-52 (E.D.N.Y. 1999), *aff'd*, 201 F.3d 432 (1999); *Ulrich v. Exxon Co., U.S.A.*, 824 F. Supp. 677, 684 (S.D. Tex. 1993) (same); *Collins v. School Dist. Kansas City*, 727 F. Supp. 1318, 1322 (W. Dist. Mo. 1990) (same).

It is time for this Court to resolve this split and decide the proper burden placed upon a reverse discrimination employee Plaintiff to establish a prima facie case.

A. The Traditional Formula For Establishing a Prima Facie Claim of Discrimination

Most employers do not discriminate openly, therefore there is seldom direct evidence of discrimination. *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999). The burden a minority employee has was initially laid down by this Court in the decision *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There, this Court said that a complainant could establish a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Of course, this Court went on to explain that this is not the only "pattern of proof" for setting forth a prima

facie case. *McDonald v. Santa Fe Trail. Transp. Co.*, 427 U.S. 273, 279 n.6 (1976). "The prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Iadimarco*, 190 F.3d at 161.

Once a prima facie case of discrimination has been established, the burden then shifts to the defendant to produce a nondiscriminatory reason for the actions complained of by the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). This is not a burden of persuasian, but instead, is simply a burden of production. *Id.* at 207. The Plaintiff, at all times, is responsible for persuading the trier of fact that the real reasons for the actions taken is impermissible discrimination. *Id.* The Plaintiff may satisfy this burden through the evidence of the prima facia case along with establishing sufficient evidence indicating that the defendant's reason is false. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000).

B. The Tenth Circuit and District Court Decision In This Matter

The trial court granted summary judgment based upon the heightened requirements of *Notari v. Denver Water Dep't.*, 971 F.2d 585 (10th Cir. 1992). *Notari*, states that when there is no direct evidence of individual discrimination, a Plaintiff in a reverse discrimination lawsuit may state a "prima facie" case under two scenarios: (1) The Plaintiff can "show background circumstances that demonstrate that his employer is one of those unusual employer who discriminate against the majority." *Id.* at 590 or; (2) the Plaintiff "must allege and produce evidence

to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.* Here, the trial court claimed that Plaintiff failed to provide evidence sufficient to establish a prima facie claim of reverse discrimination under either requirement. (App. B, at 13a, 18a). The Tenth Circuit's decision is too vague to indicate the precise analysis utilized in affirming the district court's decision. (App. A, at 5a).

C. There Should Be No Difference Between The Burden Of A Minority Plaintiff and a Reverse Discrimination Plaintiff In Establishing A Claim For Unlawful Employment Discrimination

This Court has clearly recognized the truth that Title VII protects men and whites and that they are equally protected in Title VII actions. The leading case on this issue is *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). In that case, this Court reversed a decision granting a motion to dismiss against the white plaintiffs. The facts alleged were: On September 26, 1970, the two white plaintiffs and an African-American employee "were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze . . . Six days later, [Plaintiffs] were fired by Santa Fe, while [the black employee] was retained." *Id.* at 276. The district court ruled that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." *Id.* at 278. The court of appeals affirmed and noted that the plaintiffs had not alleged that they were *falsely* accused. *Id.* at 278.

In reversing, this Court recognized that Title VII's "terms are not limited to discrimination against members of any particular race." *Id.* at 278-79, 96 S. Ct. at 1578. This Court thoroughly reviewed the legislative history of Title VII which overwhelmingly demonstrated that Title VII was intended to protected against discrimination against whites and "all Americans." *Id.* at 280; *citing and/or quoting* 110 Cong. Rec. 2578, 7213, 7218, 8912 (1964) (the remarks of Rep. Celler, and Sens. Clark, Case and Williams).

In light of the express language of the statute, and the legislative history of Title VII, this Court went on to pronounce "that Title VII prohibits racial discrimination against the white petitioners in this case *upon the same standards* as would be applicable were they Negroes . . ." *Id.* at 280. (Emphasis added). This Court found it irrelevant that the Plaintiffs' "dismissal was based upon their commission of a serious criminal offense against their employer." *Id.* at 281.

The Supreme Court explained its reasoning as follows:

> Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white. (Citations omitted). While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not."

Id. 282-83, 96 S. Ct. at 2580.

Finally, this court concluded with the understanding that while "[i]t may be that theft of property entrusted to an employer for carriage is a more compelling basis for discharge than obstruction of an employer's traffic arteries . . . this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color." *Id.* at 284.

This reasoning is entirely undermined by requiring plaintiffs who are not in a minority group are subjected to a higher burden in order to establish a prima facie case for discrimination. Here, indirect evidence supports a reasonable probability that Gallo Loeks would not have been disciplined if her race was African-American rather than Caucasian. Such evidence is sufficient to establish a *prima facie* case of discrimination. *Notari v. Denver Water Dep't.*, 971 F.2d at 590.

Here, Christian, an African-American, was provided great favoritism and repeatedly protected from her acts of misconduct, including her attempt to inappropriately benefit from the use of the company credit card. Her protector, Haliburton, an African-American, also supervised Gallo Loeks but took no steps to protect Gallo Loeks from similar allegations, despite persuasive evidence that, rather than any intentional misconduct, a simple mistake had occurred. Tarantino, the immediate supervisor of both Gallo Loeks and Christian, was very concerned but the inequality of treatment in these two cases.

Evidence suggests that minority supervisors "engage in discriminatory [employment] practices, much the same way whites often discriminatorily hire their 'own.'" Timothy K. Giordano, Comment, *Different Treatment for Non-Minority*

Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure that Separate is Equal, 49 Emory L. J. 993, 995 (2000). In support of this understanding, Mr. Giordano cites: RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 159 (1995); BERNARD BERELSON & GARY A. STEINER, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS 500-01 (1964); AND J. Stanley Gray & Anthony H. Thompson, *The Ethnic Prejudices of White and Negro College Students*, 48 J. Abnormal and Soc. Psych. 311 (1953). *Id.* n.15, 210-11 and accompanying text. Thus, the rationale supporting the courts who require a separate framework for establishing, by circumstantial evidence, a prima facie case of discrimination, are basing their rulings often on a flawed understanding of the context of discrimination against employees in a majority group.

Moreover, the higher burden placed on Plaintiff under *Notari*, as a member of the "majority" group, simply because she is a member of the "majority," is a blatant form of discrimination in itself. *See McDonald v. Santa Fe. Trail Transportation Co.*, 427 U.S. 273, 279-80 (1976). The language of the cases supporting the heightened burden on reverse discrimination claims is grounded in discussions about the "group" to which the individual employee belongs. *See Notari*, 971 F.2d at 589. However, "[a] given employer may discriminate against an individual white worker even when no evidence demonstrates that the employer generally favors workers who belong to historically disadvantaged groups." *Id.* at 590. Thus, it does not make sense to increase Plaintiff's burden simply because she is white. *See Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990) (stating that it is "unconscionable for the courts to erect this arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims.").

Requiring a reverse discrimination Plaintiff to provide evidence that otherwise is only required to rebut the employer's proffered reason undermines the very reasoning of the burden-shifting regime, "to make it easier for employees to bring claims that would otherwise be extraordinarily difficult to prove." *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999).

Therefore, other Circuits are retreating from the heightened requirements and instead, requiring only that the Plaintiff demonstrate that he or she was in a protected group, and of course, Caucasians are in a group protected by Title VII. *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000); *Bass v. Bd. of County Comm'rs.*, 256 F.3d 1096, 1103 (11th Cir. 2001) (treating Plaintiff's claim of discriminations "as discrimination claims, not as 'reverse discrimination' claims, and analyzing such claims exactly as we would any racial discrimination claim.").

Furthermore, the approach adopted by most circuits, requiring the establishment of background circumstances fail to properly focus upon the fundamental evil in which Title VII was established to abolish.

> The principal focus of the statutes is the protection of the individual employee, rather than the protection of the protected group as a whole. (Citations omitted). Section 1981, like Title VII, does not 'give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.'

Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677 (S.D. Tex. 1993); *see also Collins v. Sch. Dist. of Kansas City*, 727

F. Supp. 1318, 1322 (W.D. Mo. 1990) (stating that it is "unconscionable for the courts to erect this arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims."). Finally, placing such an onerous burden on a reverse discrimination victim only promotes the allegation that Title VII exists not to promote equal opportunities, but instead provides minority individuals with special rights. This misconception undermines the perception of the statute by the public and therefore, its remedial objective.

Here, Plaintiff established a prima facie claim of discrimination by establishing that: (1) she was a member of a protected group; she suffered an adverse employment action, and (2) she was treated differently and less favorably than a similarly situated African-American employee. *See Trujillo v. University of Colorado Health Sciences Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). Plaintiff's status as a Caucasian should be considered irrelevant to her success in establishing a prima facie case.

D. Peggy Gallo Loeks Successfully Established That The Employer's Proffered Reason Was Pretextual, Thus She is Entitled To Proceed to Trial

Finally, summary judgment was inappropriate because Ms. Gallo Loeks produced sufficient evidence demonstrating that the defendant's proffered reasons for the disparate manner in which she was treated was pretextual. As in the *McDonald* case *supra*, this case involves the illogic of disciplining a white employee, while essentially allowing a similarly situated African-American employee to do whatever she wishes. Here, the evidence is even more stark, as the evidence does not establish anything more than an innocent mistake on the part of Gallo Loeks and the course instructor.

Furthermore the evidence established that Haliburton repeatedly, and contrary to the policies of the employer, protected the African-American employee, by circumventing her immediate supervisor Tarantino. Meanwhile, this same supervisor, Haliburton, by-passed Tarantino in engaging in an overly vindictive pursuit against Gallo Loeks to punish her for a simple innocent mistake. Under these circumstances, sufficient evidence exists on the issue of pretext, precluding summary judgment. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decisions of the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado, and to resolve the split in the circuits regarding the burden placed upon a reverse discrimination plaintiff to establish a prima facie case. Furthermore, it is requested that this Court find that the plaintiff in this matter successfully established a prima facie case of discrimination as well as pretext for discrimination and remand this matter so that it may proceed to trial.

Respectfully submitted,

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